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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 OMNI PHASE RESEARCH
12 LABORATORIES, INC.,

13 Plaintiff,

14 vs.

15 EUGENE RZYSKI,

16 Defendant.
17

CASE NO. 10cv1624 DMS (RBB)

**ORDER GRANTING
PLAINTIFF'S MOTION TO
REMAND**

[Docket No. 3]

18 This matter comes before the Court on Plaintiff's motion to remand this case to San Diego
19 Superior Court. Defendant Eugene Rzycki filed an opposition to the motion, and Plaintiff filed a reply.
20 After a thorough review of the issues, the Court grants Plaintiff's motion.

21 **I.**

22 **BACKGROUND**

23 Plaintiff Omni Phase Research Laboratories, Inc. filed the present case against Defendant
24 Eugene Rzycki in San Diego Superior Court on May 29, 2009. The Complaint alleges claims for breach
25 of settlement agreement, breach of confidentiality and non-disclosure agreement, trade libel and
26 intentional interference with prospective economic advantage. Defendant filed an Answer to the
27 Complaint on August 11, 2009.

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1 The case was scheduled to begin trial on October 15, 2010, but on August 4, 2010, Defendant
 2 removed the case to this Court based on claims in a proposed cross-complaint presented to the state
 3 court on August 3, 2010. (*See* Notice of Removal ¶ 2.) Notably, the cross-complaint was never filed,
 4 but instead was “Received.” (*See* Notice of Removal, Ex. 1.)

5 On August 18, 2010, Plaintiff’s counsel sent a letter to Defendant’s counsel setting out the
 6 arguments raised in the present motion to remand, and asking Defendant to stipulate to remand the case.
 7 Defendant’s counsel did not respond. Plaintiff thereafter filed the present motion.

8 II.

9 DISCUSSION

10 Plaintiff moves to remand this case to state court on the ground that the removal was improper.
 11 Specifically, Plaintiff argues that removal cannot be based on claims in a cross-complaint. Defendant
 12 does not address this argument, but instead argues that the removal was based on the claims in the
 13 Complaint.

14 It is well-settled that counterclaims do not provide a basis for removal. *Takeda v. Northwestern*
 15 *National Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985); *Chase Manhattan Mortgage Corp. v. Smith*,
 16 507 F.3d 910, 914-15 (6th Cir. 2007); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320,
 17 326-27 (5th Cir. 1998). Since Defendant’s removal of this case was based on claims in his proposed
 18 cross-complaint, the removal was improper.

19 Defendant now retreats from his Notice of Removal, and asserts that he removed this case based
 20 on the claims in the Complaint. However, Defendant did not assert this argument in his Notice of
 21 Removal, and thus the Court declines to consider it here.¹

22 III.

23 CONCLUSION

24 For these reasons, the Court grants Plaintiff’s motion to remand. The Court also finds that
 25 Defendant “lacked an objectively reasonable basis for seeking removal[.]” *Martin v. Franklin Capital*

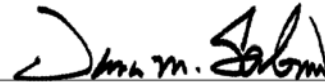
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 28 ¹ Even if the Court were to consider this argument, Defendant’s removal would be untimely.
See 28 U.S.C. § 1446(b).

1 *Corp.*, 546 U.S. 132, 141 (2005), and therefore awards Plaintiff attorneys fees in the amount of
2 \$2,765.00.²

3 **IT IS SO ORDERED.**

4 DATED: November 29, 2010



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6 HON. DANA M. SABRAW
7 United States District Judge
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27 ² This amount is based on the seven hours counsel spent on the motion multiplied by counsel's
28 hourly rate of \$395. (*See* Decl. of Edson McClellan in Supp. of Mot. ¶ 6.) Counsel requested \$5,925
based on time spent on the reply brief and at oral argument, however, the Court did not hear oral
argument on this motion, and there is no evidence of the time actually spent on the reply brief.